

SERVED: January 7, 2008

NTSB Order No. EA-5350

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 4th day of January, 2008

_____	)	
ROBERT A. STURGELL,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-18124
v.	)	
	)	
THOMAS P. MALLORY,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

Respondent, proceeding pro se, appeals the order of Administrative Law Judge William A. Pope, II, served in this emergency suspension proceeding on November 29, 2007.<sup>1</sup> By that decision, the law judge granted the Administrator's motion for judgment on the pleadings or, in the alternative, for summary

<sup>1</sup> A copy of the law judge's order is attached.

judgment (motion for summary judgment); affirmed the emergency order suspending respondent's commercial pilot certificate until respondent completed a required reexamination; and dismissed respondent's appeal. We deny respondent's appeal.

The Administrator filed the emergency order of suspension as the complaint in this proceeding, and served respondent, via overnight delivery, on November 9, 2007. To be timely, respondent had to file an answer by November 14, 2007. He has yet to file an answer to the complaint.

On November 20, 2007, the Administrator filed a motion for summary judgment, asserting that, "there remain no material issues of fact to be resolved," and that the Administrator "is entitled as a matter of law to affirmation of the Emergency Order of Suspension," due to the "[f]ailure by the respondent to deny the truth of any allegation or allegations in the complaint,"<sup>2</sup> and that, as of the date the Administrator filed that motion, respondent's answer was 6 days late, and no answer had yet been filed.

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<sup>2</sup> See 49 C.F.R. § 821.55(b) of the Board's Rules of Practice, which requires the respondent to file an answer to the complaint within 5 days after the date on which the complaint was served by the Administrator. That rule provides that failure by the respondent to deny the truth of any allegation or allegations in the complaint may be deemed an admission of the truth of the allegation or allegations not answered. The rule also states that the answer shall identify any affirmative defenses that the respondent intends to raise at the hearing.

Respondent replied to the Administrator's motion for summary judgment. In a November 26, 2007 "objection" to that motion, respondent stated that the "assertion that there remain no material issues of fact to be resolved, is not true." He did not, however, address whether he answered the complaint. He concludes his "objection" to the motion for summary judgment with: "Mallory has not failed to answer the allegations. And will do so again here in the most Concise form possible: B.S."

In his order granting the motion for summary judgment, the law judge "deemed admitted" all allegations of the complaint, and stated, "there remain no issues of material fact to be resolved." Order at 6. He found that respondent's objection to the Administrator's motion for summary judgment did "not rise to the level of" an answer,<sup>3</sup> and noted that respondent "does [not] ... offer any explanation for his failure to file an answer...." Order at 5. The law judge "specifically reject[ed]" the notion that respondent's objection to the Administrator's motion for

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<sup>3</sup> The law judge noted that the objection did not "address the allegations in the complaint in any logical and coherent way, as might be expected in an answer as required by § 821.55(b) of the Board's Rules of Practice," and did not "serve to narrow the issues in dispute by stating which of the allegations in the complaint he admits or denies, which is the purpose of an answer." Order at 4-5. "Instead, the Respondent in a very disparaging manner, asserted that it is untrue that there are no material issues of fact to be resolved...." Id. at 3.

summary judgment "could be construed to be a late-filed answer."<sup>4</sup> Id. The law judge stated that he could find nothing in respondent's pleading "that could be interpreted as a showing of good cause for the late filing of an answer." Id.

We have long strictly applied our procedural rules. We have held that, "undue laxity in the enforcement of the Board's procedural rules will hinder our administration of justice in the long view by giving one party an unfair advantage over the other, and by removing the essential element of predictability from Board proceedings."<sup>5</sup> The Board's Rules require a respondent to file an answer specifying which allegations he or she denies, and identifying any affirmative defenses that the respondent intends to raise. See 14 C.F.R. § 821.55(b). A primary purpose of this rule is to "ascertain in advance of the hearing the scope and nature of the issues that the airman wants to have adjudicated."<sup>6</sup>

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<sup>4</sup> Respondent's objection was filed 12 days after an answer was due, and 6 days (still outside the 5 days required for an answer to a complaint) after the motion for summary judgment was filed.

<sup>5</sup> Administrator v. Hayes, 1 NTSB 2016, 2017 (1972); see also Administrator v. Liles, 2 NTSB 470, 471 (1973) (administrative process defeated by "endless opening and reopening of records" where a respondent has not asserted his rights to present his case, when it was shown that he was given ample opportunity to do so).

<sup>6</sup> See Administrator v. Bruington, NTSB Order No. EA-5335 at 5 (2007), citing Administrator v. Blaesing, 7 NTSB 1075 (1991); and Administrator v. Ocampo, NTSB Order No. EA-5113 (2004).

Moreover, parties are responsible for knowing our Rules of Practice.<sup>7</sup> "We have consistently ruled that failure timely to file an answer, in the face of our clear rules and the letter from the case manager stressing the importance of filing a timely answer," may lead to our deeming the allegations in the complaint admitted.<sup>8</sup> We are not unmindful that, in the case before us, the Administrator filed the complaint on November 9, 2007, which was the Friday before a Federal holiday on Monday, November 12, 2007.<sup>9</sup> Therefore, the case manager in the Office of Administrative Law Judges (OALJ) was not able to send the docketing notice, stressing the importance of filing a timely

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<sup>7</sup> See Administrator v. Hamilton, NTSB Order No. EA-3496 (1992) (counsel expected to know and abide by deadlines); Administrator v. Sanderson, 6 NTSB 748 (1988) (lack of counsel does not excuse failure to follow rules).

<sup>8</sup> See, e.g., Administrator v. Diaz, NTSB Order No. EA-4990 at 4 (2002) (citing Blaesing, *supra*; Sanderson, *supra*; Administrator v. Taylor, 4 NTSB 1701 (1984); and Administrator v. Mommsen, 4 NTSB 830 (1983)).

<sup>9</sup> It would have been desirable in this particular case for the record to clearly reflect the delivery date of the complaint to, or the receipt by, respondent. Only under the facts of this case has that missing information not proven to be grounds for remand. While the Board's Rules of Practice do not require proof of receipt, when, as here, *adequate notice* of the complaint is at issue (see discussion of Yi Tu v. National Transportation Safety Board, 470 F.3d 941 (9th Cir. 2006), *infra*), the Administrator would be wise to avoid "a 'mechanical adherence' to the minimum form of notice authorized by regulation" (see Yi Tu, at 946, citing Dobrota v. INS, 311 F.3d 1206, 1213 (9th Cir. 2002), and we suggest that the law judge should hold the Administrator to this level of completeness of the record in a case such as this.

answer and including additional instructions for filing an answer, until Tuesday, November 13, 2007. The case manager sent this letter via overnight mail, but respondent would not have received it until the next day, November 14, 2007, the day his answer was due.

In another case, we might, in the spirit of Yi Tu v. National Transportation Safety Board, 470 F.3d 941 (9th Cir. 2006), hold otherwise. In Yi Tu, the United States Court of Appeals for the Ninth Circuit held that the FAA denied Mr. Yi Tu due process "when it failed to provide Tu with notice reasonably calculated, under all the circumstances, to notify Tu his pilot's license had been suspended, so that Tu could timely exercise his right of appeal to the NTSB." Id. at 943. There the issue was how the Administrator mailed a suspension order to Mr. Yi Tu (certified mail or first class mail). Further, the stage of the process when the Administrator mailed such notice was important.<sup>10</sup> At first look, the citizens that the FAA serves might find it implausible that the Administrator would mail such a pleading, with a very short response window already, on the last business day before a Federal holiday weekend, thus

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<sup>10</sup> There, it was the mailing of a suspension order before appeal, not, as here, the mailing of the complaint after respondent has already appealed the suspension order and is on heightened notice that further steps will follow as to his certificate.

shortening respondent's realistic response timeframe from 5 days to 1 day.

But this is not another case,<sup>11</sup> and we dispose of this appeal based on the circumstances of this case. The Administrator first advised respondent that a reexamination of

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<sup>11</sup> We do, however, caution the Administrator, and our law judges for that matter, to review Yi Tu. Certain language therein catches our attention in regard to this issue. For example, the Ninth Circuit noted that the law judge dismissed Mr. Yi Tu's appeal as untimely, "reasoning that the FAA was statutorily authorized to give notice by certified mail alone, that Tu should have anticipated that the orders would be sent by certified mail, and that his lack of diligence undermined his claim of good cause." Yi Tu, *supra* at 945. The court then held that the "FAA denied Tu due process by not providing him with *adequate notice* of the suspension orders. It thereby denied Tu the opportunity to file a timely appeal." Id. (emphasis supplied; an inference could be drawn that serving a complaint the day before a Federal holiday weekend, or even before any weekend, if Saturday delivery of overnight mail is not available, does not provide *adequate notice* of the filing of a complaint in an emergency proceeding, such as to provide the opportunity to file a timely answer). The court also stated, citing Jones v. Flowers, 126 S.Ct. 1708, 1716 (2006), that, "the government [must] consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case." Id. It is not much of a reach to extend this reasoning to consider particular circumstances surrounding the mailing of such a notice, such as the timing of the mailing in the context of a 3-day weekend and the response time for responding to such a notice. This is particularly so if said response time is only 5 days, despite the fact that the shortened response time, as discussed earlier, is for the benefit of the respondent. Finally, the court stated that, "A reasonable agency actually desirous of notifying an individual of his right to be heard would not resort to a 'mechanical adherence' to the minimum form of notice authorized by regulation in the very instance when timely notice is most crucial." Id. at 946, *citing Dobrota*, *supra* at 1213.

his competence to hold a commercial pilot certificate was necessary (because the Administrator had determined there was a reasonable basis to question whether he possessed the qualifications necessary to hold a commercial pilot certificate) on April 18, 2007. Respondent was intractable from the start. He failed to comply with this reexamination request or to respond to this notification. He also failed to respond to or comply with two subsequent letters the Administrator sent on May 9, 2007, and August 3, 2007. The Administrator had determined that reexamination was necessary because the FAA had terminated the designated pilot examiner (DPE) designation of the DPE who issued respondent's certificate, based on an investigation that revealed that the DPE had conducted incomplete practical examinations and utilized numerous other improper procedures and standards in issuing certificates and ratings. Because of the uncertainty relating to his examination with that DPE, the Administrator advised respondent that reexamination was necessary. When respondent failed to respond to three attempts to have a reexamination, the Administrator issued an emergency order of suspension on October 25, 2007, said suspension to be effective only until such time as respondent successfully completed the required reexamination and his qualifications were established.



It is noteworthy that the Administrator, in the emergency suspension order, pointed respondent to the Board's Rules of Practice in Air Safety Proceedings, 49 C.F.R. part 821, subpart I, relating to appeals of emergency orders. Because the Administrator had determined that an emergency existed relating to safety in air commerce, the suspension order was effective immediately, and respondent was required to immediately surrender his certificate by mail or personal delivery.

We note here that an "emergency revocation has an effect limited in time to a period of sixty days. While no hearing is required before revocation [or suspension], the statute provides that an appeal by the licensee must be decided within sixty days. ... Thus, while the action is termed an 'emergency revocation' [or suspension], it is for all intents and purposes a suspension for sixty days or less. We point this out, not to invoke a de minimis concept, but to demonstrate that the statutory procedure does afford a prompt adjudication after revocation." Air East v. National Transportation Safety Board, 512 F.2d 1227, 1231 (3rd Cir. 1975). The United States Court of Appeals for the Third Circuit also noted that the petitioners there asserted "that they did not have sufficient time to prepare their defense and appeal to the Board. But, the expedited disposition mandated by the statute is for the benefit

of the licensees, and they were free to waive it. Probably, for economic reasons, petitioners chose not to do so." Id. at n.8.

We cite Air East to remind respondents that the timelines of our emergency procedures are not meant to penalize them by compressing filing timelines, but are meant to compress the decision timetable for the Board for the benefit of respondents. In that regard, we are aware that many respondents rely on their certificates for their livelihoods. While a respondent's filing of an appeal stays the Administrator's order of suspension in a non-emergency case and the respondent retains his or her certificate during the appeal process, the Administrator's order is effective immediately in an emergency case, and the respondent must immediately surrender his or her certificate pending the decision of the Board.

In the instant case, the Administrator's October 25, 2007 emergency suspension order directed respondent to the Board's Rules of Practice for emergency proceedings.<sup>12</sup> In compliance with those rules, thereby indicating that he understood them, respondent filed a timely notice of appeal within 10 days of the date of service of that emergency order, although he noted therein that he "was simply unable to meet the totally

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<sup>12</sup> The emergency suspension order also stated that, if respondent "filed an appeal to the NTSB, a copy of this Emergency Order will be filed with the NTSB as the Administrator's Complaint in that proceeding."

unreasonable stipulations for [him] to file against the emergency nature of the regional counsels filing.”<sup>13</sup> Respondent also asked “that this filing of notice of appeal might please be handled in the most expeditious manner and as quickly as possible. I am ready for a hearing at this time and suggest that any delay will only further contribute to a travesty of justice.”<sup>14</sup>

The envelope containing respondent’s notice of appeal (and mailed to the NTSB OALJ) reflects a postmark of November 5, 2007, and the certificate of service indicates it was served on that date. The Administrator received the notice of appeal on November 8, 2007, and served the complaint the following day. Our OALJ did not receive the complaint until November 13, 2007,

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<sup>13</sup> Respondent was required to file a notice of appeal on or before November 4, 2007, but because that date fell on a Sunday, the notice of appeal was due on the next business day, Monday, November 5, 2007; the notice of appeal was, therefore, timely.

<sup>14</sup> In the meantime, we note that respondent surrendered his certificate directly to the Administrator, included with a letter on October 29, 2007, stating:

In that I received recent correspondence from your Atlanta office that you have determined that I constitute an emergency, and that I should surrender my Commercial Certificate, it is attached.

The reason I have sent it directly to you is so that you might be totally aware of the sorry state of your Atlanta office and the wrongful and illegal things that have been and are being done in your name. I will leave it to you to find for yourself of what I speak.

and, therefore, did not send its letter, with additional filing instructions for the answer to the complaint, until that day, which was the day before respondent's answer was due. We note, however, that along with the notification to respondent of the filing of the complaint, the Administrator had enclosed another copy of the October 25, 2007 emergency order of suspension, including the aforementioned reference to the Board's Rules of Practice. The order not only referenced the correct Code of Federal Regulations (C.F.R.) citation to the Board's Rules, it included the 1-800 telephone number of the OALJ, and the NTSB website address, which included not only the Board's Rules of Practice, but sample forms and other information to assist respondent.<sup>15</sup>

Again, the referenced Board Rules also indicate that, "respondent shall file with the Board an answer to the complaint within 5 days" and that failure to deny the truth of any

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<sup>15</sup> In fact, NTSB Form 2005.2, Notice of Appeal, contains a fill-in-the-blank format that prompts a respondent for a telephone number and a facsimile number, both of which facilitate an alternate means of communication with respondent. Respondent did not use the form provided, and included neither a telephone number nor a facsimile number (the latter of which would have made possible immediate receipt of the complaint from the Administrator and the docketing notice from the OALJ) on the notice of appeal that he filed. See 49 C.F.R. § 821.55(a), which states in part that, "the Administrator's complaint shall be filed by overnight delivery service or *facsimile* ... within 3 days after the date on which the Administrator received the respondent's appeal...." (Emphasis added.)

allegations in the complaint may be deemed an admission of the truth of the allegations not answered. See 49 C.F.R. 821.55(b). Not only are the rules referenced, but the website, in easy-to-understand language, includes the following:

**Process for filing an Answer to the Allegations (FAA's Order/Complaint)**

**What is an Answer?**

The Answer is your response to the FAA's Order of Suspension.... You must file a timely Answer pursuant to our Rules of Practice 49 C.F.R. ... Part 821.55 if you are appealing from an emergency order.

**What will happen if I do not file one?**

If you do not file a **TIMELY** Answer, your case will likely be dismissed.

Please complete the Answer Form NTSB.2005.1 in its entirety, including the certificate of service, print it out and sign it.

(Emphasis in original.) In addition to including documents (including an answer form guiding respondent to admit or deny each paragraph of the complaint) to assist respondent in pursuing his appeal, the docketing notice from the OALJ contained the following pertinent language:

***... Please call 1-800-854-8758 upon receipt of this letter, so that we can determine if hearing for this matter should proceed on an emergency expedited basis or routine basis. If not provided, please furnish us with a home and business phone number for you. ...***

Inasmuch as you are appealing from an emergency order ... your appeal must be handled in accordance with Sections 821.52-57, the Board's Rules of Practice in

Air Safety Proceedings, a copy of which is enclosed for your information and future guidance. ...

Section 821.55(b) of the Board's Rules of Practice provide that **you must file an answer to the Administrator's complaint ... within 5 days after service of the complaint upon Respondent.** However, if you choose to waive the emergency procedures, the time for filing your answer to the complaint is extended in accordance with the provisions of Section 821.31(b). ***Enclosed is an optional answer form for your use. This form is also available in Adobe Acrobat format on the NTSB website at [www.NTSB.gov](http://www.NTSB.gov) under the heading "Legal Matters."*** A copy of your answer must also be sent to the FAA Counsel. ...

**In the event you intend to hire an attorney, you should do so immediately. (You are not required to have an attorney, but it is advisable to have one....**

You may, of course, waive the emergency procedures in this proceeding....

(Emphasis in original.) We emphasize several items in this letter. First, even if respondent did not receive the complaint until the day before his answer was due, and even if he did not receive this letter from the OALJ until the day his answer was due, he was instructed to call the OALJ upon receipt of the letter.

Second, respondent could have discussed with the OALJ his options regarding his answer. One option would have been to waive the emergency procedures and extend the time for filing his answer to 20 days, in accordance with 821.31(b). Another option was to continue with emergency processing, in which case the OALJ would have advised respondent that his answer was due

that day, and that they could guide him through the form and assist in his filing a timely answer. The final option that the OALJ could have discussed with respondent was extending the time for filing his answer in the emergency proceeding, based on a showing of good cause, in that he had not received the complaint until that day or the day before.

Third, the OALJ could have answered any questions about respondent's answer, pointing out that respondent should admit or deny each paragraph of the complaint and that respondent should present any affirmative defenses at this point.

Finally, the OALJ could have advised respondent that he might consider getting an attorney as he would be expected to know the rules of procedure and to abide by them.

As we have already indicated, this is not a case like Yi Tu. Respondent was obdurate from the beginning. His notice of appeal on November 4, 2007, described the proceeding as a "travesty of justice," and he indicated that it "escape[d] [him] as to how this matter could be contrived to be an emergency where the FAA has taken about a year to file anything." In his November 26, 2007 objection to the motion for summary judgment, respondent indicated he had intentionally not filed an answer:

Notwithstanding [sic] the Styling of the case above (as copied from the FAA's Motion) Mallory now is the Complainant and the FAA is the respondent. If the Board should like Mallory to file an answer to his own complaint, I stand ready to do so, but I have

requested a hearing to do [sic] hear the complaint and provide answers.

Objection at ¶ 2. He further stated that, "Right on Mallory's Notice of Appeal is a statement complaining of the lack of truth in their ambiguous allegations." (id. at ¶ 3), and that, "Mallory will present his case at the hearing. Why do we simply not have a hearing and get to the bottom of all this? Is that not the American way?" (id. at ¶ 4), clearly indicating his intention not to file an answer, but to present his case at a hearing. Respondent further stated that, "The administrator had no right to confiscate Mallory's pilot license without a hearing" (id. at ¶ 5), further indicating that he wants to move straight to the hearing without the bother of filing an answer. Respondent's final statement shows that he was not confused about filing deadlines, nor was he complaining that he needed more time to file an answer. He was indicating that he had no intention of filing an answer, other than the crude, terse answer he felt he had already communicated: "B.S."

Nor has respondent's approach to the matter softened. In his appeal brief filed on December 3, 2007 (appealing the law judge's order granting the Administrator's motion for summary judgment), respondent states:

The administrator has consistently denied the respondent and others to present the truth in these matters and has otherwise never taken any notice of the truth when presented. ... There has been no



sufficient complaint upon which to base the administrator's actions what so ever [sic]. In fact the administrator's complaints are so general and non specific [sic] as to be insufficient as allegations at all. In actuality, your respondent is hard pressed to even make a rebuttal to such lies, half truths, and innuendoes.

\* \* \*

Respondent has already stood an examination and has established that his qualifications to hold a commercial pilot certificate have been established.

\* \* \*

The administrator committed a crime when he took my certificates and gave me nothing in return. The inspector had no reason nor right to do so. At the time of my check rides, the designated examiner was in good standing with the FAA. ... These ridiculous actions by the FAA are only the showing of a conspiracy to cover their own mistakes.

\* \* \*

I know that all of this is somewhat hard to follow, and that is the reason the hearing is requested.

\* \* \*

Is the NTSB only the rubber stamp of the FAA? I surely hope not.

The Administrator's statements are simply childlike and below the expected level of any competent attorney and only further misleading. Right on Mallory's Notice of Appeal is a statement complaining of the lack of truth in their ambiguous allegations.

Mallory has been accused of disregard for the Federal Aviation Agency's regulations. This is ludicrous, however I do abhor misleading, uninformed and incomplete statements. Also to this list I would add dishonesty, lying, ignorance and injustice.

These statements are incorrect and misleading.  
Mallory will present his case at the hearing.

\* \* \*

This was a crime when the license was taken. No wonder the FAA wants no hearing after acting like a bunch of Nazis[.]

Finally, respondent once again repeats his concise answer to the allegations: "B.S." The balance of respondent's appeal goes, perhaps, to the heart of his grievance. He wants to litigate the termination of the designation of the DPE who issued his certificate, but that is not an issue in this case.

Respondent did not file a timely answer, and he has not demonstrated good cause for not doing so. As the law judge followed clear and long-standing precedent in this matter, we find no abuse of discretion. Further, we adopt the law judge's discussion and analysis in this case.

**ACCORDINGLY, IT IS ORDERED THAT:**

Respondent's appeal is denied.

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.